



Issue Date: 16 January 2018

BALCA Case No.: 2018-TLN-00041
ETA Case No.: H-400-17290-965210

In the Matter of:

RESENDIZ PINE STRAW, LLC,
Employer.

Certifying Officer: Leslie Abella Dahan
Chicago National Processing Center

Appearances: Javier Resendiz, *Pro Se*
Buford, Georgia
For the Employer

Office of the Solicitor
U.S. Department of Labor
Washington, D.C.
For the Certifying Officer

Before: Larry A. Temin
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to Resendiz Pine Straw, LLC’s (“Employer”) request for review of the Certifying Officer’s (“CO”) Non Acceptance Denial in the above-captioned H-2B temporary labor certification matter.¹ The H-2B program permits employers to hire foreign workers to perform temporary, non-agricultural work within the United States on a one-time, seasonal, peak load or intermittent

¹ 20 C.F.R. § 655, Subpart A (codified April 1, 2016). On April 29, 2015, the Department of Labor (the “Department”) and the Department of Homeland Security jointly published an Interim Final Rule (“IFR”) amending the standards and procedures that govern the H-2B temporary labor certification program. 80 Fed. Reg. 24042 (Apr. 29, 2015). The IFR rules apply to this case.

basis.² Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the U.S. Department of Labor (“Department”).³ A Certifying Officer in the Office of Foreign Labor Certification of the Employment and Training Administration reviews applications for temporary labor certification. If the CO denies certification, an employer may seek administrative review before BALCA.⁴

STATEMENT OF THE CASE

The Employer is a harvesting and landscaping company located in Buford, Georgia. (AF 65).⁵ On October 30, 2017, the Employer filed with the CO the following documents: (1) ETA Form 9142B, *Application for Temporary Employment Certification* (“Application”); (2) SWA job order; and (3) a Prevailing Wage Determination. (AF 64-75). The Employer requested certification for forty-seven (47) landscaping and grounds keeping workers⁶ to harvest pine straw from January 1, 2018, until February 28, 2018, based on an alleged seasonal need during that period. (AF 64).

On November 6, 2017, the CO issued a Notice of Deficiency (“NOD”), which outlined six deficiencies in the Employer’s Application. (AF 54-63). Specifically, the CO stated that the Employer (1) failed to satisfy the application filing time requirements; (2) failed to establish the job opportunity was temporary in nature; (3) failed to establish temporary need for the number of workers requested; (4) failed to submit an acceptable job order; (5) failed to submit a complete and accurate ETA Form 9142B; and (6) failed to file a disclosure of foreign worker recruitment. *Id.* As pertinent to this appeal, the CO determined that the Employer’s application did not meet the filing timeframe provided for in the regulations as it was filed 63 days before the Employer’s stated date of need. (AF 57-58). The CO instructed the Employer to file an emergency request to waive the filing requirement or to provide a new date of need that was in compliance with the regulations. *Id.* Additionally, the CO determined that the Employer failed to establish a temporary need for the number of workers requested. (AF 58-60). The CO stated that the Employer had not explained the events causing a seasonal need or a specific period of time it would not need the services and labor requested and noted that a labor shortage did not justify a temporary need for workers. (AF 58). The CO also stated that the Employer had not demonstrated that its request for 47 workers represented a bona fide job opportunity. (AF 59-60). The CO advised that in order to establish a seasonal need, the Employer needed to submit evidence that justified the dates of need and the number of workers requested. (AF 58-60).

On November 21, 2017, the Employer submitted additional documents in response to the Notice of Deficiency. (AF 29-53). As it relates to this appeal, the Employer submitted a letter of explanation stating the CO could amend the application to reflect a start date that was in compliance with the regulations (AF 29), a revised statement of temporary need stating that it

² See 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. § 655.6(b). The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii), pursuant to the Department of Labor Appropriations Act, 2016 (Div. H, Title I of the Consolidated Appropriations Act, 2016, Pub. L. No. 114-113) § 113 (Dec. 18, 2015).

³ 8 C.F.R. § 214.2(h)(6)(iii).

⁴ 20 C.F.R. § 655.61(a).

⁵ In this Decision and Order, “AF” refers to the Appeal File.

⁶ SOC (O*Net/OES) occupation title “Landscaping and Grounds keeping Workers” and occupation code 37-3011. (AF 64).

had a one-time need for workers from January 1, 2018, until February 28, 2018 (AF 33), and copies of invoices, a collaborative contract agreement, company activities charts from 2016 and 2017 and a list of wholesale customers. (AF 34-53).

On December 18, 2017, the CO issued a Non Acceptance Denial (“Denial”) concluding that the Employer (1) failed to satisfy the application filing time requirements; (2) failed to establish the job opportunity was temporary in nature; and (3) failed to establish temporary need for the number of workers requested. (AF 15-28). On December 20, 2017, the Employer requested administrative review of the CO’s Non Acceptance Denial, as permitted by 20 C.F.R. § 655.61.⁷ (AF 1-13).

On January 2, 2018, I issued a Notice of Docketing and Order Setting Briefing Schedule, permitting the Employer and counsel for the Certifying Officer (“Solicitor”) to file briefs within seven business days of receiving the Appeal File.⁸ On January 3, 2018, BALCA received the Appeal File from the CO. Neither party has filed a brief.

DISCUSSION AND APPLICABLE LAW

BALCA’s standard of review in H-2B cases is limited. BALCA may only consider the Appeal File prepared by the CO, the legal briefs submitted by the parties, and the Employer’s request for administrative review, which may only contain legal arguments, and evidence that the Employer actually submitted to the CO before the date the CO issued a final determination.⁹ After considering the evidence of record, BALCA must: (1) affirm the CO’s determination; (2) reverse or modify the CO’s determination; or (3) remand the case to the CO for further action.¹⁰

The Employer bears the burden of proving that it is entitled to temporary labor certification.¹¹ The CO may only grant the Employer’s Application to admit H-2B workers for temporary non-agricultural employment if the Employer has demonstrated that: (1) insufficient qualified U.S. workers are available to perform the temporary services or labor for which the Employer desires to hire foreign workers; and (2) employing H-2B workers will not adversely affect the wages and working conditions of U.S. workers similarly employed.¹²

⁷ Pursuant to 20 C.F.R. § 655.61(a), within ten (10) business days of the CO’s adverse determination, an employer may request that BALCA review the CO’s denial. Within seven (7) business days of receipt of an employer’s appeal, the CO will assemble and submit to BALCA an administrative Appeal File. 20 C.F.R. § 655.61(b). Within seven (7) business days of receipt of the Appeal File, counsel for the CO may submit a brief in support of the CO’s decision. 20 C.F.R. § 655.61(c). The Chief Administrative Law Judge may designate a single member or a three-member panel of BALCA to consider a case. 20 C.F.R. § 655.61(d). Pursuant to 20 C.F.R. § 655.61(f), BALCA should notify the employer, CO, and counsel for the CO of its decision within seven (7) business days of the submission of the CO’s brief or ten (10) business days after receipt of the Appeal File, whichever is later, using means to ensure same day or next day delivery

⁸ 20 C.F.R. § 655.61(c).

⁹ 20 C.F.R. § 655.61.

¹⁰ 20 C.F.R. § 655.61(e).

¹¹ 8 U.S.C. § 1361; *see also Cajun Constructors, Inc.*, 2011-TLN-00004, slip op. at 7 (Jan. 10, 2011); *Andy and Ed Inc., dba Great Chow*, 2014-TLN-00040, slip op. at 2 (Sept. 10, 2014); *Eagle Industrial Professional Services*, 2009-TLN-00073, slip op. at 5 (July 28, 2009).

¹² 20 C.F.R. § 655.1(a).

Failure to Satisfy Application Filing Requirements

The regulations state that an Application for Temporary Employment Certification must be filed no more than 90 calendar days and no less than 75 calendar days before the employer's date of need.¹³ The Employer submitted its Application on October 30, 2017 with a date of need beginning on January 1, 2018. (AF 64). Thus, the Employer filed its application only 63 days before the first date of need, which does not meet the filing requirements outlined in the regulations.

In the NOD, the CO instructed the Employer to file an emergency request to waive the filing requirement as outlined in 20 C.F.R. § 655.17 or to provide a new date of need that was in compliance with the regulations. (AF 57-58). In its response, the Employer stated that the CO could amend the Application to reflect a start date that was in compliance with the regulations. (AF 29). In the Denial, the CO stated that the Chicago NPC did not have the authority to choose a date for the Employer and concluded that the Employer's response did not overcome the deficiency. (AF 18). As the Employer has failed to file a request for waiver of the filing requirements or amend its Application to select a date of need that meets the filing requirements in the regulations, I find that it failed to timely submit its application.

Failure to Establish a Temporary Need for Workers

To obtain certification under the H-2B program, the Employer must establish that its need for workers qualifies as temporary under one of the four temporary need standards: one-time occurrence, seasonal, peak load, or intermittent.¹⁴ The Employer "must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary."¹⁵ Pursuant to § 113 of the Department of Labor Appropriations Act, 2016, "for the purpose of regulating admission of temporary workers under the H-2B program, the definition of temporary need shall be that provided in 8 CFR 214.2(h)(6)(ii)(B)."¹⁶ Accordingly, 8 C.F.R. § 214.2(h)(6)(ii)(B) provides:

Employment is of a temporary nature when the employer needs a worker for a limited period of time. The employer must establish that the need for the employee will end in the near, definable future. Generally, that period of time will be limited to one year or less, but in the case of a one-time event could last up to 3 years. The petitioner's need for the services or labor shall be a one-time occurrence, a seasonal need, a peak load need, or an intermittent need.

The Employer initially stated that it had a seasonal need for workers from January 1, 2018 to February 28, 2018 to complete work during a harvest season that ran from October until

¹³ 20 C.F.R. § 655.17(b).

¹⁴ 20 C.F.R. § 655.6(b); 20 C.F.R. § 655.11(a)(3).

¹⁵ 20 C.F.R. § 655.6 (a).

¹⁶ Department of Labor Appropriations Act, 2016 (Div. H, Title I of the Consolidated Appropriations Act, 2016, Pub. L. No. 114-113), § 113 (Dec. 18, 2015).

the end of February. (AF 64). In response to the NOD, the Employer stated that it had a one-time need for workers from January 1, 2018 to February 28, 2018 in order to fulfill a large contract. (AF 33).

In order to establish a seasonal need, the Employer must establish that the services or labor it seeks workers for is traditionally tied to a season of the year by an event or pattern and is of a recurring nature.¹⁷ The Employer must specify the period(s) of time during each year in which it does not need the services or labor.¹⁸ The employment is not seasonal if the period during which the services or labor is not needed, is unpredictable or subject to change, or is considered a vacation period for the petitioner’s permanent employees.¹⁹ Therefore, in order to determine whether the Employer’s need for pine straw harvesters is seasonal, it must establish when the season occurs and how its need for labor during that time of year differs from other times of the year.

In its Application, under the Statement of Temporary Need, the Employer explained that “[w]orkers are needed for the harvesting season that runs from October until the end of February. We have been unable to find enough workers who are willing to work in the adverse weather conditions that exist during the harvesting season. We need additional workers to meet the demands of our clients for pine straw.” (AF 64). In response to the NOD, the Employer submitted company activity charts from January 2016 to June 2017, which show the number of bales produced or sold each month and the number of employees paid each month. (AF 49-53). The following chart summarizes the information contained in the activity charts:

Month/Year	Number of Bales	Number of Employees Paid
January 2016	21,715	21
February	32,009	24
March	62,349	47
April	83,697	63
May	95,169	77
June	73,021	51
July	46,469	35
August	23,469	13
September	7,646	8
October	12,585	9
November	9,845	7
December	13,368	10
January 2017	56,192	36
February	21,725	16
March	52,182	29
April	46,500	25

¹⁷ 8 C.F.R. § 214.2(h)(6)(ii)(B)(2).

¹⁸ *Id.*

¹⁹ *Id.*

May	43,871	18
June	30,857	25

I find that the Employer's submitted documentation does not support its allegation that it has a seasonal need for workers from the requested period of January 1, 2018 to February 28, 2018. The Employer has provided no documentation to establish that the harvesting season for pine straw runs from October to February, as it claims. It is not clear if the information submitted by the Employer shows how many bales are *sold* each month or how many bales are *harvested* each month and so is insufficient to demonstrate a sustained, increased need for workers from October to February. Even if I were to assume that the numbers provided by the Employer indicated the number of bales harvested each month, based on the information provided the bales harvested and workers contracted from October 2016 to February 2017 is, on average, significantly less than the bales produced and workers needed at other times of the year. Thus, the Employer has not demonstrated that its need for H-2B workers is tied to a specific season. Further, the Employer's activities chart does not support its assertion that it needs additional workers from October to February. Again, the record shows that the Employer's need for workers has decreased during that time. Based on the evidence of record, I find that the Employer has not carried its burden to show that it has a seasonal need for workers from October until February.

The record also does not establish that the Employer has a one-time need for labor. To establish a one-time occurrence, an employer must show (1) that it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future, or (2) that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for temporary workers.²⁰

The record here is insufficient to show that the Employer has not employed workers to perform work as harvesters in the past and that it will not need workers to perform such services or labor in the future. The Employer asserts that it has a one-time need for workers to harvest and bale pine straw from January to February in order to fill a contract. (AF 33). Documentation provided by the Employer shows that from January 2016 to June of 2017 the Employer hired workers to produce bales of pine straw. (AF 49-53). Accordingly, the Employer has hired workers to perform these services in the past. The Employer has also not established that it will have no need for workers to provide these services in the future. The Board has held that when an employer's business model is based on obtaining multiple successive contracts, the employer cannot establish a one-time need by focusing on a specific contract.²¹ Here, the record indicates that the Employer is a harvesting and landscaping service company that contracts to provide bales of pine straw to clients on a regular basis. (AF 34-53). Thus, the Employer has not established that it has no need to seek workers to provide these services in the future. Overall, the Employer has failed to provide sufficient evidence or argument to show that its current need for workers materially differs from its need in the past or its future need for workers. This, along with the Employer's business model of routinely engaging in multiple contracts to provide products, fails to demonstrate that the Employer has not employed workers to perform the

²⁰ 8 C.F.R. § 214.2(h)(6)(ii)(B)(1).

²¹ *Cajun Constructors, Inc.*, 2009-TLN-00096 (BALCA Oct. 9, 2009).

services or labor in the past and that it will not need workers to perform the services or labor in the future.

The Employer has also failed to establish that a temporary event of short duration has created the need for temporary workers. The Employer states that it needs additional workers to fulfill a large contract. (AF 33). The Board has held that when a company's business model depends on filling successive contracts, a specific contract cannot be a temporary event of short duration which creates a discrete temporary need because "at some point, the combination of 'temporary' projects create[s] a permanent need for the Employer."²² Thus the fact that an employer routinely enters into unique and discrete contracts to provide products is not sufficient to show that it now has a temporary need for workers as the combination of its contracts creates a permanent need. Further, the fact that the new contract requires the Employer to produce 150,000 bales by March also does not create a temporary need for workers. The Board has made it clear that the scale or particular requirements of a contract cannot establish a temporary need when it is an employer's business model to contract for services on successive projects. In *Turnkey Cleaning Services*, the Board concluded that the employer failed to satisfy the second prong of the one-time occurrence standard:

Where the nature of the Employer's business is to contract to provide services on a project and then move on to another project, the fact that this particular contract may be larger and cover more detailed services than the previous contracts does not by itself indicate that the need for such labor will be limited to a one-time occurrence.²³

Similarly, in *Herder Plumbing, Inc.*, the Board rejected the employer's argument that a recent award of a large contract created a need to supplement the workforce, holding that the contract was not a temporary event but rather an indication that the Employer continued to grow its business.²⁴

Like the cases cited above, the Employer's business model is to contract to provide services and goods to other contractors and requires continued procurement of such contracts. Similar to *Herder Plumbing*, the Employer's new contract is not a temporary event but rather an indication that the Employer has continued to grow its business. There is no evidence of record to suggest that the need for labor in this instance is limited to a one-time occurrence. Further, the Employer has provided no indication that its need for landscaping and grounds keeping workers will not continue past February 28, 2018, as it has indicated that it will continue to procure additional contracts to provide goods and services. Thus, the Employer cannot show that its need for such workers will be of a short duration.

In sum, the Employer has not demonstrated a temporary event of short duration. The size and scope of this current contract is insufficient to demonstrate that it is unique from other contracts that the Employer engages in. The Employer is in the business of fulfilling successive contracts to provide goods and services and has not demonstrated that its needs for this project

²² *Cajun Constructors, Inc.* 2010-TLN-00079, PDF at 5 (BALCA Oct. 5, 2010).

²³ *Turnkey Cleaning Services, GOM, LLC.*, 2014-TLN-00042, PDF at 5 (BALCA Oct. 1, 2014).

²⁴ *Herder Plumbing Inc.*, 2014-TLN-00010, PDF at 6 (BALCA Feb. 12, 2014).

are different from its similar needs on other projects or that its overall need for such workers is a temporary need that will end in the near, definable future.

After reviewing the record, I concur with the CO that the Employer has failed to establish that it has either a seasonal or a one-time need for H-2B workers from January 1, 2018, until February 28, 2018. The Employer has not demonstrated that it has a seasonal need for H-2B workers that is tied to a specific season and increases from October to February. Nor has the Employer demonstrated that it has a one-time need for labor as it cannot show that it has not employed workers to perform harvesting services or labor in the past and that it will not need workers to perform such services or labor in the future, or that it has an employment situation that is otherwise permanent but a temporary event of short duration has created the need for temporary workers. Therefore, I find that the CO properly concluded that the Employer failed to establish a temporary seasonal or one-time need for H-2B workers.

Failure to Justify a Need for 47 Workers

The final issue on appeal is whether the Employer has demonstrated that it has a need for 47 landscaping and grounds keeping workers and whether its request for those workers represents a bona fide job opportunity. The regulations provide that the CO will “review the *H-2B Registration* and its accompanying documentation for completeness and make a determination based on the following factors . . . (3) The number of worker positions and period of need are justified; and (4) The request represents a bona fide job opportunity.”²⁵ In the NOD and Denial, the CO concluded that the Employer failed to justify a need for 47 landscaping and grounds keeping workers and that it was unclear how the Employer determined the number of worker’s requested. (AF 20-21, AF 59-60).

In its response to the NOD, the Employer wrote that a worker can produce 50 bales in 8 hours and so it needed 47 workers to produce 150,000 bales by the end of February. (AF 33). The documentation provided by the Employer indicates that it has hired as many as 47 workers in the past and that it has a need to produce at least 150,000 bales by the end of February. However, as noted by the CO, the record is insufficient to support the Employer’s assertion that an individual worker can produce 50 bales per day. Thus, it is not clear from the record how the Employer fully calculated how many additional workers it would need to fulfill the contract. Therefore, I find that the Employer has not established that the request for 47 landscaping and groundskeeping workers represents a bona fide job opportunity. Therefore, I find that the CO properly determined that the Employer failed to meet the requirements of 20 C.F.R. § 655.11(e)(3)-(4).

²⁵ 20 C.F.R. § 655.11(e)(3)-(4).

ORDER

In light of the foregoing, it is **ORDERED** that the Certifying Officer's decision denying certification be, and hereby is, **AFFIRMED**.

For the Board:

Larry A. Temin
Administrative Law Judge